No. 79-1977

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FREDERICO RODRIGUEZ,

Petitioner,

—against—

COMPASS SHIPPING CO. LTD. and DJAKARTA LLOYD, P. N.,

Respondent.

LUIS PEREZ,

Petitioner,

—against—

ARYA NATIONAL SHIPPING LINE, LTD.,

Respondent.

SRECKO BARULEC,

Petitioner,

—against—

OVE SKOU, R. A.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONERS

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Questions Presented for Review

1. When there is a statutory assignment to an employer of the right to bring a third party action under Section 33(b) of 33 U.S.C. 933(b) and the employer fails or refuses to prosecute the third party action, does such failure constitute a waiver of the employer's rights under the assignment and is the right to sue deemed reassigned to the injured workman?

2. Where there is a conflict of interest between the employer and employee, and the employer fails or refuses to sue a third party for its negligence do equitable considerations require that the Act be interpreted so as to permit the injured workman to sue the third party even though more than six months elapses from the date of payment of an award in a compensation order?

3. Are the applicable purposes of the Statute 33 U.S.C. 901 *et seq.* for the employer to recoup its loss occasioned by the payment of compensation and for the injured employee to have the right to sue a negligent third party for damages and should such purposes be considered in interpreting the Act; should such purposes be considered in judging the harshness of depriving the injured workman of his right to sue and to benefit the negligent third party?

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I.

Applicable Statutes

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 933(b):

> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner *or Board* shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

33 U.S.C. 933(e):

> (e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:
>
> (1) The employer shall retain an amount equal to—
>
> (A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner *or Board*);
>
> (B) the cost of all benefits actually furnished by him to the employee under section 7;
>
> (C) all amounts paid as compensation;
>
> (D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 7, to be estimated by the deputy commissioner, and the

amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any such finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

II.

Statement of the Case

Rodriguez v. *Compass Shipping* is one of a group of cases in which a longshoreman brings an action to recover damages for personal injuries sustained on board shipowner's vessel due to the negligence of the shipowner. Claim was also made for Workmen's Compensation benefits.

In *Rodriguez* the accident occurred September 4, 1973. On November 4, 1974 the parties in the compensation case settled the claim at an informal conference before a claims examiner.

The agreement was set forth in a U. S. Department of Labor form and signed by the Claims Examiner and the parties. Payment of the agreed upon amount was promptly made.

On July 2, 1977 the action to recover damages was commenced against shipowner and bare-boat charterer by plaintiff Rodriguez.

In *Perez* v. *Arya National Shipping Line, Ltd.*, the accident occurred August 30, 1973. A compensation order was

entered on March 24, 1975 and on July 7, 1976 action was commenced against shipowner by Perez.

In *Barulec* v. *Ove Skou R.A.*, the accident occurred on January 6, 1975. A Memorandum of Informal Conference was prepared and signed by the claims examiner on February 11, 1976, and action was commenced February 22, 1978 by Barulec.

In all three cases the employer did not commence an action against shipowner.

In all cases defendants moved for summary judgment based on plaintiff's failure to sue within six months of the "settlement agreement" as allegedly required by 33 U.S.C. § 933(b).

Such motions were granted and the various Petitioners filed a timely Notice of Appeal.

The Opinions of the District Courts in these cases are not officially reported except *Perez* v. *Arya National Shipping* is reported at 468 F.Sup. 799 and the Opinions of the lower courts are set forth in the Supplemental Appendix to the Petition, pages 1e, 1f, 1g.

At the time of the argument of the appeal in the *Rodriguez* v. *Compass Shipping Co. Ltd.* case, in the Court of Appeals, Second Circuit, the Petitioners' Luis Perez and Srecko Barulec appeals as well as two other appeals entitled *Juan Hernandez* v. *Costa Armatori, S.P.A., "PIA COSTA"* and *Leonard DiFazio* v. *Jugoslavenska Linijska Plovidba "VISE VICA"* were consolidated for the purpose of arguing the appeals together since they all involved the same questions of law. The judgments of the District Courts with respect to all cases were affirmed for reasons stated in the *Rodriguez* v. *Compass Shipping Co. Ltd.* case. Judgments to that effect were entered by the Circuit Court on March 19, 1980.

The Opinion of the Court of Appeals in *Rodriguez* v. *Compass Shipping Co. Ltd.* and *Djakarta Lloyd, P.N.* is officially reported at 617 F.2d 955 and was made a part of the Appendix B to the Petition. The Opinion of the United States Court of Appeals for the Fourth Circuit in the case of *Caldwell* v. *Ogden Sea Transport, Inc.* decided March 27, 1980 is not yet officially reported. Pertinent portions of said *Caldwell* Opinion are printed in the Appendix A to the Petition.

The judgments of the United States Court of Appeals for the Second Circuit were entered on March 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). Diversity of citizenship and damages exceeding the jurisdictional amount were the bases for Federal jurisdiction in the court of first instance.

III.

Statement of Facts

The pertinent facts on this appeal are that plaintiff Rodriguez, a longshoreman (as were the other petitioners), was injured and received workman's compensation benefits. The Circuit Court found that payments of such benefits were made pursuant to an award as referred to in 33 U.S.C. 933(b).

More than six months after such award plaintiff commenced an action against shipowner to recover damages for personal injuries sustained due to their negligence.

The employer-stevedore as assignee did not bring a third party action against the defendants. Shipowner claimed that pursuant to said Section 933(b) the plaintiffs claim was assigned to the stevedore six months after the award and hence plaintiff was not the proper party to be suing.

Plaintiff claimed that there was a conflict of interest between employer and employee and economically the stevedores do not wish to antagonize shipowners, their customers. Therefore, none of the stevedores ever sued the shipowner. It was also claimed that equitable consideration as well as the conflict of interest created an exception to the statutory assignment provision of the Act.

An attorney's affidavit was submitted to the lower court on the question of conflict of interest relating that the Vice President of International Terminal Operating Co., Albert P. Cerrachio, has advised that "as a matter of company policy ITO did not in the past bring, maintain and/or assume the prosecution of any action against a shipowner. Mr. Cerrachio, although pressed to do so, declined to make further comment." (J.A. 63a). ITO was plaintiff's Rodriguez employer.

IV.

The Decision in Rodriguez

The Court of Appeal refused to apply the equitable principles set forth in *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525 (1956).

The Court held however that *"the employee has an interest conflicting with that of the employer, which often chooses not to antagonize its customer, the shipowner, by bringing a law suit against it. See Valentino* v. *Rickners Rhederei G.M.B.H.*, 552 F.2d 446 (2d Cir. 1977)" (12b). Despite such a finding of a conflict of interest they chose to limit *Czaplicki* to the unique fact situation there presented and refused to apply its equitable principles.

In *Valentino* v. *Rickners Rhederei G.M.B.H., SS ETHA*, 552 F.2d 466 (2 Cir. 1977), the Court stated the following:

"At oral argument, both parties stated that stevedores do not, as a practical manner, pursue these law suits —presumably for fear of antagonizing their customers.

• • •

Thus, Appellant asks us to sacrifice the actual rights of longshoremen and their lawyers to the theoretical possibility that they might elect to press such claims at such time in the future. We refuse to do this." 469.

V.

Summary of Argument

1. Under 33 U.S.C. Sections 933(b) and (e), equitable considerations here require the Statute be interpreted so that injured workmen be permitted to sue shipowners:

a) Since the statutory assignment never became effective because of the absence of the condition precedent of "no conflict of interest". (*Czaplicki* v. *The Hoegh Silvercloud,* 351 U.S. 527).

b) Since in equity there was a waiver by stevedore of its rights by its failure to sue and there is a reassignment of such rights to the injured longshoreman.

c) Since the failure of stevedore to sue frustrates the purpose of the Act and injured workmen may sue no matter what the reason for such failure. (*Potomac Electric Power Co.* v. *Wynn, Jr.,* 434 F.2d 295 (D. C. Cir. 1965)).

2. The position taken by the Second Circuit here is against public policy, with a harsh result, in violation of the intent of Congress and the purpose of said Section 933 in that:

(a) It helps the shipowner to avoid its liability for its negligence and eliminates the incentive for shipowner to exercise reasonable care to provide a safe place to work.

(b) It deprives the employee of a substantial right to a recovery against shipowner for its negligence.

(c) Indirectly it will permit the stevedore to pay compensation for an injury without receiving repayment of its lien for such expenditure. Since shipowner pays nothing the stevedore is in effect contributing to or indemnifying shipowner—to stevedore's detriment and with a major loss to the employee.

(d) Part of the scheme and purposes of the 1972 Amendment to the Act was to provide for the stevedoring company husbanding its resources to be able to provide greater benefits to longshoremen. By not recovering its lien, stevedore is depleting its resources to the benefit of shipowner and the detriment of longshoremen.

(e) The statute was made for the benefit of longshoremen and not for shipowners. In view of stevedore's refusal to act, it will result in a contravention of the purposes of the Act—namely, shipowner will benefit and longshoremen will not.

(f) The economic power of the steamship company will have overcome the stevedore's best interests leaving them without reimbursement for their lien and depriving the longshoreman of that which is in his best interest and which he is entitled to.

VI.

ARGUMENT

A. *The purposes of the Act are to benefit the longshoremen, to promote safety and for Stevedore to recoup its payments.*

The Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 et seq. is a remedial statute enacted for the benefit of longshoremen, their safety and welfare. The purposes of the Act are not to benefit the shipowners. The purposes, and in particular as they pertain to the 1972 Amendments thereto have been variously set forth as follows:—

The Senate Report No. 92-1125 sets forth the objective of the 1972 Amendments to the Act as "It is the Committee's view that every appropriate means be applied toward improving the tragic and intolerable conditions which take such heavy toll upon workers' lives and bodies in this industry—" (p. 2). Basing the liability of vessels as third parties on negligence is "—fully consistent with the objective of protecting the health and safety of employees who work on board vessels." (p. 10) Also, "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work." (p. 10)

In *Johnson* v. *A/S Ivarans Rederi,* 613 F.2d 334 (1 Cir. 1980), the Court stated that "the overriding purpose of the 1972 Amendments was to create incentives for safety in the nation's second most dangerous profession." (339). The Court also said:

> "Finally, standards developed to implement Section 905(b) must reflect the fact that the LHWCA is a remedial statute enacted to protect the longshoreman

> and not the vessel. Doubt as to the interpretation of the Act and the development of standards of care implementing it must be resolved in favor of the longshoremen. See Edmonds v. Compagnie Generale Transatlantique, —— U.S. ——, 99 S. Ct. 2753, 61 L.Ed. 2d 521 (1979)." (347-348)

In *De Los Santos* v. *Scindia Steam Navigation Co., Ltd.*, 598 F.2d 480 (9 Cir. 1979), the Court stated that with respect to the 1972 Amendments:

> First, Congress was concerned about safety. The Senate Committee on Labor and Public Welfare protested that longshoring had an injury frequency rate "well over four times the average for manufacturing operations," and called for safer working conditions when it insisted that "every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies. . . ." Senate Report at 2. The Amendments sought to strengthen economic incentives "to provide the fullest measure of on-the-job safety." House Report at 4699. The higher compensation benefits were meant to "assure that the employer bears the cost of unsafe conditions." Senate Report at 2. "Permitting actions against the vessel based on negligence" was meant to "meet the objective of encouraging safety." House Report at 4704. (484)

In *Samuels* v. *Empresa Lineas Maritimas Argentinas*, 573 F.2d 884 (5 Cir., 1978), the Circuit Court stated that the fundamental congressional aims in 1972 were two-fold:

> 1) To eliminate the unseaworthiness action but leave a negligence action with promotion of shipboard safety as a primary focus, and

2) To eliminate any form of shipowner's attempt to shift liability in whole or in part, directly or indirectly, to the stevedore.

The Statute provides for a statutory assignment of an injured employee's right to sue a third party six months after an award in a compensation order where he fails to sue during that period of time. It provides for an incentive to the employer to sue the third party to the extent of retaining, out of the recovery, not only its compensation lien plus attorney's fees and expenses, but also 20% of the sum collected. The employee retains the economic benefit to the balance of the recovery. 33 U.S.C. Sec. 933(b) and (e).

The Statute fails, however, to provide for the eventuality should the employer fail to sue.

Until the 1972 Amendments to the L.H.W.C.A., 33 U.S.C. 901 *et seq.*, the courts generally permitted employees to sue the third party after the six month period from the date of a compensation order on the theory of conflict of interest between the employer and employee.

In *Cella* v. *Parternreederi M.S. Ravenna*, 529 F.2d 15 (1 Cir. 1975) the Circuit Court stated the sense of the statutory purpose to be:

> "—to strictly limit the liability of the stevedore in order to husband its resources, and its insurance carrier's resources, for payment of the increased benefits under the Act." (20)

B. *Czaplicki Rule—the Assignee has control over the right of action but the Statute presupposes assignees interest will not be in conflict with those of Employee. Where there is a conflict of interest and inaction by assignee-employer as here, the employee should be allowed to sue.*

The Supreme Court in *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525 (1956), stated that in a very real sense

the injured employee has an interest in his right of action even after it has been assigned; that normally the employee's interest would not be inconsistent with that of the assignee who would want to recoup the payments made in compensation.

> "Since the assignee's right to recoup comes before the employee's interest, and because the assignee is likely to be in a better position to prosecute any claims against a third party, control over the right of action is given to the assignee . . ." (531)
>
> "In giving the assignee exclusive control over the right of action, however, we think that the Statute presupposes that the assignee's interest will not be in conflict with those of the employee and that through action of the assignee the employee will obtain his share of the proceeds of the right of action, if there is a recovery. Here, where there is such a conflict of interest, the inaction of the assignee operates to defeat the employee's interest in any possible recovery." (531)

In such circumstances, the Court stated that the Statute should be construed to allow the employee to enforce, in his own name, the rights of action that were his originally. Where there is a conflict of interest and inaction by the assignee, the employee should be allowed to sue since that is the proper way to insure him the rights given by the compensation act, namely, to secure his statutory share in the proceeds of any action.

In *Czaplicki,* the Court held that the plaintiff could bring the suit not because there had been no assignment, but because there was no other procedure by which plaintiff could secure his statutory share in the proceeds of his right of action. In the concurring opinion of Justice Frankfurter

there is set forth that the assignee employer holds the claim against the tortfeasor for the benefit of the employee so far as it is not necessary for his own recoupment. Thus although the statute gives the assignee the power to compromise the whole claim, he must not, in doing so, entirely disregard the employee's interest.

The Second Circuit in *Rodriguez* recognized that in *Czaplicki,* on the facts there presented the Supreme Court understandably held that the conflict of interest was sufficient to nullify the assignment. The Court also stated that the employer, unlike its employee had no interest in pressing the claim. The Court found that the state of affairs changed in 1959 and the problem further alleviated in 1972. It further stated "Moreover had Congress desired when it amended the Act to give both the employee and employer the right concurrently to sue the shipowner, nothing prevented it from doing so. Instead, it chose to give the employee six months within which to bring such suit and if the employee failed to do so within that period to assign the right exclusively to the employer." (p. 13b Petition for Writ)

The Circuit Court found that the 1959 change in Section 33(b) of the Act which provides for an assignment six months after an award justified the restrictive application of *Czaplicki.* The Court overlooked the fact that after 1959 and until the lower Court's decision in *Rodriguez,* the Courts generally permitted the longshoremen to sue shipowner even after the six month period. There is no basis for the court's view in this respect.

The Second Circuit also claimed Congress, in 1972, eliminated any employer's liability to a shipowner. It viewed this as an alleviation of the problems arising from conflicts of interest as dealt with in *Czaplicki.* It therefore

concluded that the injured longshoreman's right was restricted in his right to recover damages against shipowner for his negligence, contrary to Congressional intent. The law as it existed in 1972 at the time of the amendment to the Act permitted the longshoremen to sue shipowner regardless of there being a compensation order and the passage of the six month period of time thereafter. *Czaplicki* is judge-made law. Congress could not anticipate the Court changing this. The reasoning of the Second Circuit in this respect is contrary to that which is set forth in *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979).

The Circuit Court confuses concurrent right to sue with the *Czaplicki* case. Where there is a concurrent right both stevedore-employer and the injured employee have the right to sue. *Czaplicki* proceeds on the theory that the statute grant an exclusive right to the assignee to *control* the third-party case. What the Supreme Court said there was that such assignment presupposes that there is no conflict of interest. Thus, whether there is exclusivity or not, a condition precedent to the effectiveness of the assignment is that there is no conflict of interest. Here, in our case, there is such conflict.

If the Second Circuit could justify to itself the application of the *Czaplicki* rule to the facts in that case then consistency requires that the assignment provision cease to be effective when there is a conflict of interest affecting the purposes of the Act.

The Statute does not state that six months after receipt of payment under a compensation order the steamship company cannot be sued. This is not a statute of limitations. Shipowner is not relieved of liability after the six-month period for the consequences of its negligence. The statutory assignment is merely an assignment of control

of plaintiff's cause of action. Plaintiff continues to have a real and financial interest in the cause of action. In *Rodriguez,* the Second Circuit recognized that by reason of shipowner's economic control over stevedore no action would be taken. Thus, shipowner has gotten control of plaintiff's cause of action. As for the stevedores, their failure to sue and prosecute the claim is not acting as Congress intended them to. They are not "controlling" the cause of action as contemplated in the Statute. The purpose of control is recoupment, not the relieving of shipowner of its responsibility. Their failure to act is defeating plaintiff's right to damages for shipowner's negligence. Stevedore has an obligation to prosecute the action. The inequity involved here is obvious and was never within the contemplation of Congress nor consistent with the purposes of the Act.

The rule enunciated in *Czaplicki* is directly applicable to our case and yet the Second Circuit has refused to apply it. In *Rodriguez* the Court found a conflict of interest and acknowledged the Supreme Court's reason for the *Czaplicki* rule. The Court, however, limited the rule to the facts of that case. It refused to apply the rule to any other fact situation and would not follow the law as reasoned and interpreted in that case. Thus, the Second Circuit is now changing the case law and is so interpreting the Act and *Czaplicki* as to:

1. Make a Statute of Limitations out of Section 933(b) of the Act with an absolute assignment thereunder to the detriment of plaintiff and stevedore and for the benefit of shipowner.

2. Deprive the injured longshoreman of his right to his share of the proceeds of the third party action when

brought by stevedore (See Section 933(e)) since no action is brought.

3. Reduce the time exposure of shipowner to a law suit for damages for its negligence and in that fashion reduce the incentive for shipowner to promote safety on board ship.

4. Permit economic pressure by shipowner to stop stevedore from suing and so lose their right to recoupment.

Indicative of the error in the Circuit Court's approach to the problem is its statement that the employee has an interest conflicting with that of the employer. In view of the purposes of the Act it would be more to the point and correct in approach if the Court had stated that the employer's interest conflicts with that of the employee or simply that a conflict existed between them. See *Czaplicki* (statute presupposes "the assignee's interest will not be in conflict with those of the employee". p. 531)

The Second Circuit strictly limited an employee's right to sue to a period of six months. They ignored the purposes of the Act and that the L.H.W.C.A. should be interpreted broadly in favor of the injured longshoreman who should be permitted to prove his case against the shipowner to recover damages against him arising out of the latter's negligence or fault. See *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) and *Northeast Marine Terminal Co., Inc.* v. *Caputo*, 432 U.S. 249 (1977). The Second Circuit chose instead a narrow statutory construction thereby defeating an injured employee's rights to the benefits he is entitled to under the act; relieving shipowner of its responsibility for the results of its negligence; and shifting to plaintiff, the burden of a loss occasioned by the fault of shipowner.

C. Potomac Electric Co. v. Wynn, Jr., *the law in effect in 1972, relies on the purposes of the act to hold that the employee may bring suit against the third party whenever it is evident that the employer, for whatever reason, does not intend to bring suit.*

The Circuit Court was in error in refusing to follow *Potomac Electric Power Co. (PEPCO)* v. *Wynn, Jr.*, 343 F.2d 295 (D.C. Cir. 1965). In that case the Court held that although payment was made pursuant to a compensation order and more than six months elapsed from the date of payment, the employee was still permitted to bring suit when it was clear that the employer, for whatever reason, would not bring suit.

The District Court below here chose instead to follow *Bandy* v. *Bank Line, Ltd.*, 442 F. Supp. 882 (E.D. Va. 1977) (cited by the 2nd Circuit as authority) placing the burden of proving a conflict of interest between employer and employee on the employee to overcome the statutory assignment referred to in 33 U.S.C. 933(b). It justified such position by asserting that such was Congressional intent. It is submitted that the Court was in error.

The Bandy Court set forth two purposes for the assignment; (1) to enable the employer to control the potential suit by which the employer may recoup the sums expended as compensation payments and (2) to permit the interested party with the greater financial and legal resources to prosecute the claim for the benefit of both the employer and the employee.

Obviously the failure of the stevedore to sue the shipowner here defeats both purposes—since the employer has given up control or never assumed same and there will be no recoupment; and as for the second purpose listed above, same is rendered useless. Of what use are greater financial and legal resources justifying an assignment if

not acted upon? Where, therefore, the employer has not acted on any statutory assignment at any time and obviously will not, the purposes of the assignment are not satisfied. With respect to any possible purpose to assist the steamship company, such statutory assignment was not designed to aid the steamship company to avoid its liability for its negligence.

Furthermore, *Bandy* was a part of the appeal entitled *Caldwell* v. *Ogden Sea Transport, Inc.*, 4 Cir. 1980 (1a—*et seq.* of plaintiff's petition for writ) and was reversed.

In *Potomac Electric Power Co. (PEPCO)* v. *Wynn, Jr.*, 343 F.2d 295 (D.C. Cir. 1965) the Circuit Court analyzed the amended statute post 1959. There an employee received an award in compensation and thereafter commenced an action against Potomac two weeks before the expiration of the three year statute of limitation. Potomac moved to dismiss the complaint claiming that by statutory assignment the employee was no longer the real party in interest as more than six months elapsed since the award. The Circuit Court denied the motion to dismiss making the following rulings:

> 1) The Longshoremen's and Harbor Workers' Act must be construed liberally in favor of the injured employee.
>
> 2) In 1959 the Act was amended to enlarge the rights of the employee. The amendments provided a financial incentive for the employer to take vigorous action against the third party by allowing the employer to retain one-fifth (1/5) of the proceeds recovered in excess of his expenses and lien. This financial incentive was to encourage the employee to permit assignment of his action in order to enlist the superior resources of the employer in suing the third party.

3) If the employer fails to sue after the statutory assignment, the employee should not be required to produce evidence regarding the employer's motives as such a burden would be inconsistent with the underlying purposes of the 1959 Amendment—to facilitate the employee's recovery against the third party.

4) The statute is not designed to protect third parties from suit but an important purpose is to safeguard the employer's right to recoupment.

5) This purpose of recoupment by the employer does not require the court to penalize the employee if the employer declines to sue the third party. In effect, the employer's declination amounts to a waiver of the protection offered by the statutory assignment.

6) The Act's purposes to benefit the employee, as interpreted by *Czaplicki* v. *The Hoegh Silvercloud,* 351 U.S. 527 (1956) and supplemented by the 1959 Amendments support the view that the employee may bring suit against a third party whenever it is evident that the employer, for whatever reason, does not intend to bring suit.

7) There is no reason in law or equity why an injured employee's rights against a tort feasor should be sacrificed on the altar of the employer's self-interest.

In commenting on the Supreme Court's decision in *Czaplicki, supra,* the Circuit Court in Potomac said that the Statute presupposes that the assignee's interest will not be in conflict with those of the employee. Where there is a conflict and inaction by the assignee, the employee can maintain the third party action himself.

Note that the Senate Committee Report 92-1125 pertaining to the 1972 amendments to the Longshoreman and Harbor Workers' Act at page 3 reports that there was some discussion with respect to continuing said Act as the Workman's Compensation statute covering workmen employed in private industry in the District of Columbia. The Committee Reports state that representatives of such employees stated that these workers desired to continue coverage under said Act. By its action, Congress agreed.

The D.C. Circuit Court has within its district possibly the greatest number of employees affected by this Act. It therefor had more than just a passing interest in the matters discussed in Potomac. That case was decided in 1965 and was in effect and the prevailing law in 1972.

In *Joyner* v. *F&B Enterprises Inc.*, 448 F.2d 1185 (D. of C. Cir. 1971) the Circuit Court cited Potomac stating that it is settled that an injured workman may bring suit against a third party whenever it is evident that the employer assignee for whatever reason doesn't intend to bring suit. When the hearings were held on the question of amending 33 U.S.C. 901, et seq. Sec. 933(b) pertaining to the statutory assignment was not changed and it must have been assumed that the interpretation of that section was as set forth in Potomac.

It was surely not within the contemplation of all parties concerned with the amendments to the Act that a new interpretation would be given to the statutory assignment. The change from Potomac to Bandy and Rodriguez has deprived injured employees of a substantial right. There has been much said and written of the compromises affected by the Amendment to the Act in 1972. There is constant reference to a quid pro quo. Nothing at any time was said of a quid pro quo for the giving up of such substantial right.

The courts had held that an employee may sue shipowner as long as there is no formal order and as long as the employer indicates that he will not sue or act upon the statutory assignment. Everyone assumed that the law was fixed and changes would be statutory in nature—open and known. The employees of the District of Columbia actually requested their Workman's Compensation coverage be continued under the Act. To now find that workmen have lost an established right when no such loss was contemplated or intended at the time of the Amendment, is to destroy the foundation of statutes based on compromise. The District of Columbia workers had a right to assume that under the Act, they would continue to have their rights as set forth in Potomac. If a loss of such rights was involved, they would not have expressed a desire to continue being covered by the Act and at least would have said something about it in opposing such change.

Were it otherwise, one would say that this was retrogressive legislation and that was not the intent of Congress.

It would likewise be unheard of to have employees give up rights of a substantial nature on the passage of a compensation statute without a quid pro quo.

D. Edmonds *v.* Compagnie Generale Transatlantique *holds*

1. In 1972 Congress did not intend any change in the then existing law pertaining to the effect of the statutory assignment under sec. 933(b);

2. The applicable law is a combination of statutory and judicially created law and under the circumstances courts are not free to change judicially created law.

In *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U.S. 256, the Supreme Court pointed out: 1. That because of political considerations and the compromises

affected by the 1972 Amendments, where Congress did not enact a change in the law in any particular respect and did not mention or show an intent to change the law, it must be presumed that Congress did not intend any change in the law. The Court said:

> "The legislative history strongly counsels against the Court of Appeals' interpretation of the statute, which modifies the longshoreman's pre-existing rights against the negligent vessel. The reports and debates leading up to the 1972 amendments contained not a word of this concept. This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." [18] (266-267)

Footnote 18 referred to includes the statement:

> The debate over § 905(b) involved the removal of the shipowner's liability for unseaworthiness. That occurred as a concomitant of ending liability under the stevedore's warranty of workmanlike service, which was a *quid pro quo* for increasing the compensation benefits. See S. Rep. 9-10. Some congressmen objected to removing the vessel's liability for unseaworthiness because that would deny millions of dollars of relief for longshoremen's injuries. 118 Cong. Rec. 36382-36384 (1972) (Reps. Eckhardt, Dent, and Ashley). Indeed, the concern shared by some congressmen over any modification of third-party actions "had political ramifications which . . . resulted in forestalling any improvements in the . . . Act for over twelve years." S. Rep. 9. Those congressmen likely would have assailed the diminution of the longshoreman's recovery in proportion to the stevedore's fault if they had any inkling that the amendments did that

The Court also stated at page 271:

> "Consequently, as we have done before, we must reject a 'theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts . . . a remedial act . . .' *Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. at 278-279."

We have already pointed out that at the time of passage of the 1972 amendment, *Potomac Electric Power Co.* v. *Wynn, Jr., supra,* was the applicable law. Congress did not change that law nor indicated any intention that sec. 933(b) of the Act be interpreted differently than theretofore.

2. Since the applicable law is a combination of statutory and judicially created law, the Supreme Court discussed the question as to whether the courts could or should change the judicially created law as it existed in 1972. The Supreme Court concluded that courts should not do so as they said in *Edmonds* on pages 271-272:

> "we are mindful that here we deal with an interface of statutory and judge-made law. In 1972 Congress aligned the rights and liabilities of stevedores, shipowners, and longshoremen in light of the rules of maritime law that it chose not to change.[21] 'One of the most controversial and difficult issues which [Congress was] required to resolve . . . concern[ed] the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations.' S. Rep. 8 By now changing what we have already established that Congress understood to be the law,[22] and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases

advise, we should stay our hand in these circumstances. *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U. S., at 112; *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S., at 285-286. Once Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them. A change in the conditions would effectively alter the statute by causing it to reach different results than Congress envisioned."

In Footnote 32, the Court included:

"*. . . we can only presume that they acted with the existing state of the law, not the probability of future judicial change, in mind.*"

The circuit court in *Rodriguez* holds in effect that Congress should anticipate that the courts would change the case holdings and if they wanted the law to continue as it existed prior to the 1972 Amendment, then Congress should have so stated affirmatively. The Court suggested that Congress should have set forth in the law that stevedore and longshoremen have concurrent rights to sue the ship. Since Congress did not do so when they had an opportunity so to do, then the Court assumed that Congress did not wish the longshoremen to have such rights.

Such reasoning runs directly contrary to that which the Supreme Court stated in *Edmonds*. There the Supreme Court specifically held that when Congress did not mention or consider any changes in any part of the L.H.W.C.A., by passing the amendments, they had no intention of changing the unmentioned portion of the statute. The Supreme Court also stated that Congress could not anticipate changes made in the law by judicially created law, or what the courts would decide in the future. In *Edmonds*, the

Court advised that courts are not free to change judicially created law.

E. Rodriguez *creates a harsh result contrary to congressional intent.*

Comment should be made of shipowner's position here that plaintiff received sufficient recompense by receiving compensation benefits. They claim that there is no need for plaintiff to sue shipowner because of such payments and the intent of the Statute was to protect the shipowner from such law suits. In effect, shipowner claims that the intent of Congress was to limit the amount received by the injured longshoreman to such benefits. What is unconscionable about this is the fact that in suing a shipowner an injured longshoreman would be entitled to receive not only repayment of his lost wages and medical expense, but also payment for pain and suffering, past and future. Also, under the Workmen's Compensation Act plaintiff is entitled to receive as benefits "maximum" payments based on a formula consisting of a multiple of the national average weekly wage or ⅔ of his average weekly wage—whichever is *lower* (Sen. Rep. p. 4). It appears, therefore, that by not suing the shipowner, plaintiff loses at least ⅓ of his lost earnings plus payment for his pain and suffering. It should be noted that the more sever the injury, the greater the disparity between compensation benefits and that which the shipowner would have to pay as a result of a negligence law suit. Also, the more industrious the longshoreman and the higher his earnings, the more he loses because of the 'maximum'. Yet, shipowner here seems to think that an injured longshoreman is receiving in compensation the equivalent of his losses and, therefore, should be discouraged from suing. The court in *Rodriguez* does not view it as harsh to limit a longshoreman to compensation only.

Congress never intended that shipowner's liability be limited in any manner to the amount of the compensation benefits. Shipowner here claims (and the court deems it not harsh) that the longshoremen should receive compensation benefits only and they should be paid for by the stevedore, thereby leaving the shipowner free from all liability. They attempted to get Congress to include in the Statute that shipowner should be considered employers of longshoremen and so when sued their limit of exposure would have been compensation benefits. Thus, p. 8 of the Sen. Rep. pertaining to the Amendments states:

> "The Committee rejected the proposal, originally advanced by the industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels. This would result in restricting the vessel's liability in all cases to the compensation and other benefits payable under the Act."

Congress having rejected such attempt by shipowner to limit their liability they now claim that Congress intended that their liability should be nil and only stevedore should pay (compensation benefits.)

In *Rodriguez*, the court overlooked the statement in *Edmunds* that

> "Congress clearly contemplated that the employee be free to sue the third party vessel, to prove negligence and causation on the vessel's part, and to have the total damages set by the court or jury without regard to the benefits he has received or to which he may be entitled under the Act". (268)

F. Rodriguez *holding is against public policy since it provides for contribution to Shipowner by Stevedore, at the latter's expense.*

The Circuit Court's opinion and conclusion in *Rodriguez* is contrary to Congressional intent. By the passage of the 1972 Amendments, Congress did not intend the result arrived at by the court. The Senate Committee Report states, at page 11, that a vessel may not by contractual agreement or otherwise require the employer to indemnify it in whole or in part for damages for which it is liable to an injured workman; that vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from a covered employer for employee's injuries.

The Report goes on to state that the Act prohibits such recovery.

Thus the rule regarding indemnity is a crucial part of the legislative scheme. The Court stated in *Lopez* v. *A/S D/S Svendborg and D/S of 1912*, 581 F.2d 319 (2 Cir. 1978) at 329:

> "To maintain the integrity of that scheme, we should not adopt a rule as to negligence that is so inconsistent with the indemnity prohibition as to undermine a principle which Congress has established as fundamental. As stated in an analogous context in *Laird* v. *Nelms*, 406 U.S. 797, 802 (1972): 'To permit [defendant] to proceed on [an independent contractor] theory here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe the Act permits such a result.' There is no warrant for a contention that a right to indemnity arising out of the relationship between an employer and its independent contractor

> is intrinsically immutable. Congress has excised that incident of the relationship 'as a matter of public policy' in cases covered by § 905(b)."

Thus, the economic relationship which results in a contribution from stevedore to shipowner, as here, and penalizes the longshoreman in the process is against public policy and void.

Under Section 905 (b) plaintiff has a right to sue shipowner for its negligence. The Congressional Committee's report pertaining to the 1972 Amendments set forth that imposing such liability will provide the incentive to shipowner to see that its vessel is a safe place to work. The safety on board ship is a prime objective of the Amendments. Yet, contrary to Congressional intent, such ship's liability is eliminated after the six month's provision because of the refusal of stevedore to sue or pursue the action. In *Lopez, supra*, the Court stated at 327:

> "In rejecting the argument of a shipowner that it should not be held liable unless its negligence was the sole cause of the damages, we noted in *Landon*, id. at 763: 'Congress would hardly have given the ship so little incentive to avoid being negligent toward its longshoremen invitees.' The basis for an assumption that prevention can be maximized by shifting the liability to one already liable, and only for a lesser amount is doubtful."

The Congressional Committee reports and statute recognize shipowner's economic power over the stevedores and in legislating that there should be no indemnity or contribution by stevedore to shipowner, made it clear that there should be none directly or indirectly.

Despite the foregoing shipowner is indirectly receiving contribution, contrary to law as a result of stevedore's failure to sue. Despite the foregoing, the economic power wielded by shipowners makes stevedores not sue under the Statutory Assignment.

Here stevedore's refusal to act and failure to seek recoveries against shipowner in all cases is not husbanding its resources for it is giving reimbursement of its compensation payments. In *Lopez*, *supra*, the Court stated at 325-326:

> "In *Pope & Talbot, Inc.* v. *Hawn*, *supra*, the Court held that even though the stevedore was concurrently negligent, it could still recover its compensation lien in full, noting, 346 U.S. at 412, that 'reduction of [the shipowner's] liability at the expense of [the stevedore] would be the substantial equivalent of contribution which we declined to require in the *Halcyon* case.' We have recently held that *Pope & Talbot* is still good law. *London*, *supra*, 521 F.2d at 760."

In the pertinent opinion of *Dodge* v. *Mitsui*, 528 F.2d 669 (9 Cir. 1975), the Circuit Court stated at 673:

> The problem with the above approach is: call the lien what you may, equitable or legal, the reduction of the stevedore's recovery would be another form of contribution, which the Act seeks to prohibit. The Supreme Court in *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953), held that even though the stevedore was concurrently negligent, it could still recover its compensation lien in full:
>
> > § 33 of the [Longshoremen's and Harbor Workers' Compensation] Act has specific provisions to permit an employer to recoup his compensation payments

> out of any recovery from a third person negligently causing such injuries. [The shipowner's] contention if accepted would frustrate this purpose to protect employers who are subjected to absolute liability by the Act. Moreover, reduction of [the shipowner's] liability at the expense of [the stevedore employer] would be the substantial equivalent of contribution which we declined to require in the *Halcyon* case. 346 U.S. at 412, 74 S.Ct. at 206.

and stated at 674

> We find no intent indicated by the Act to take away from the employer who pays compensation without an award his right to reimbursement out of his employee's recovery from third persons. On the contrary, we think that the intent and scheme of the Act requires that the employer's right to subrogation for compensation payments made in the circumstances here shown be recognized *wholly apart from* and without regard for the assignment provided for in Sec. 33(b) of the Act. It is only the right of control of the employee's right of action against third persons which an employer foregoes by paying compensation without an award. *His right to reimbursement out of the recovery for the employee's injury remains unaffected. The Etna*, 138 F.2d 37, 41 (3rd Cir. 1943) (emphasis added).

The Court in *Dodge* indicates that eliminating the stevedore's recovery would be another form of contribution which the Act seeks to prohibit. Also since the statute specifically provides for an employer recouping his compensation payments, the effect of the economic relationship between stevedore and shipowner "frustrates" the purpose of protecting the employers who are subject to absolute liability by the Act. In the process, plaintiff has

been deprived of his right to recover damages for injuries sustained due to the negligence of the shipowner whether by his suing directly or his collecting his share of the recovery obtained by stevedore in the exercise of the control of the employee's right of action.

Thus, shipowner benefits to the detriment of the plaintiff, an injured workmen, and his employer—stevedore.

Perhaps the most surprising thing of all is that under the foregoing, with the statutory purposes and objectives clearly spelled out, the steamship company still seeks to benefit at the expense of the longshoreman and stevedore by undercutting Congressional intent and statutory purpose and the Second Circuit upholds them in doing so. Shipowner is the one that claims that plaintiff lost his rights to sue defendant and that the stevedore is the only one that can sue—knowing full well that stevedore will never sue—or more correctly, dare not sue. It is stevedore that has the right to intervene in the action and to raise the question of assignment of the cause of action. Shipowner is not the third party beneficiary for such assignment. By Act of Congress they are liable for their negligence without any foreshortened "Statute of Limitations" whether sued by the longshoreman or the stevedore. They seek to choose their adversary. They should not, under these circumstances, have the right to make such choice by raising the question of assignment to defeat a longshoreman's claim.

If they seek to protect themselves from a multiplicity of law suits, they should move to join the employer-assignee in the action under F.R.C.P. 17a.

G. Caldwell *v.* Ogden Sea Transport Inc. *is consistent with Congressional intent, the purposes of the Act and the unrestricted application of the Czaplicki Rule.*

The *Rodriguez* opinion and decision came down on March 19, 1980. Eight days later on March 27, 1980, the Court of Appeals, Fourth Circuit, decided *Caldwell* v. *Ogden Sea Transport, Inc.*, a post 1972 Amendment case (1a-12a). It involved the identical questions of law decided by the Second Circuit in *Rodriguez*. The Fourth Circuit took the diametrically opposite position as to the purpose of the Act, the equitable considerations to be applied, the philosophy of the law involved, and the conclusions reached as to the interpretation and application of the Act and in particular, Section 933(b) thereof. It refused to restrict *Czaplicki* to its peculiar facts.

The Fourth Circuit stated:

> "LHWCA should be interpreted broadly in favor of the injured longshoreman. *E.g., Voris* v. *Eikel*, 346 U.S. 328, 333 (1953). One of its objectives is to place "the burden ultimately on the company whose default caused the injury," *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 324 (1964), and a negligent shipowner would seem to have no complaint if that burden is placed upon it by the longshoreman rather than the employer or its insurer" (2a).

Where there is a statutory assignment to the employer, the statute does not deal directly with a solution to the problem where the employer fails to bring an action.

> *"While LHWCA does not specifically provide the solution, it certainly cannot be thought to have been intended by Congress that the longshoreman's sub-*

> *stantive right might be lost simply through inaction of the assignee until the claim is barred from prosecution by anyone.* What is needed is a solution that adequately protects the assignee's first right of exclusive action but that also protects the longshoreman's substantive right against loss through inaction of the assignee for whatever reason" (8a-9a). (Italics supplied.)

The Fourth Circuit did not reject or restrict *Czaplicki* as the Second Circuit did but sought to apply its equitable principles. The Court stated:

> "The fundamental point in *Czaplicki* is that notwithstanding a statutory assignment of the longshoreman's right of action, that right of action may be revested in the longshoreman when it becomes manifest that the assignee, with knowledge of its exclusive right to control and prosecute the claim, nevertheless declines to do so for any reason. This surely accords with the equitable considerations that the longshoreman should not lose his substantive right simply by reason of disinclination of the statutory assignee to sue" (11a).

The Court then directed a method of procedure to effectuate its opinion whereby the assignee would be joined as an involuntary plaintiff under F.R.C.P. 19(a). (Under *Rodriguez* such procedure would not be employed.)

Thus the views expressed in *Caldwell* (4 Cir.) are consistent with Congressional intent and purposes of the Act and are in conflict with those expressed in *Rodriguez* (2 Cir.).

At this point it should be noted that in *Northeast Stevedores* v. *Caputo, supra,* this Court stated that the Act must be liberally construed in conformance with its pur-

pose and in a way which avoids harsh and incongruous results. The Second Circuit ignored the purposes of the Act; created a result relieving shipowner of the consequences of its negligence and then stated categorically that limiting the injured employee's time to sue to six months is not harsh,—even if the employer fails to sue thereafter. His substantive rights to recovery from the third party are simply lost by the mistaken belief that such loss is not harsh. Thus, by narrow statutory construction, ignoring the purposes of the Act, the injured employee is deprived of his claim for damages against the third party. The Second Circuit's interpretation of the Act makes it become a statute protecting the steamship company whose fault caused the accident and who by economic means, controls the actions of the stevedore, to the detriment of the injured longshoreman, contrary to Congressional intent.

VII.

CONCLUSION

The decisions of the United States Court of Appeals, Second Circuit, in this matter should be reversed and the judgments entered against petitioners herein should be vacated.

Respectfully submitted,

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